IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

WHITNEY C. STEPHENSON, Plaintiff, vs. PFIZER INC., Defendant.	))))))))))	C.A. NO. 1:13-cv-147 **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 56, Defendant Pfizer Inc. hereby moves for summary judgment in its favor in the above-referenced matter.

INTRODUCTION

Plaintiff was a pharmaceutical sales representative for Pfizer until November 2011, when a vision impairment resulted in her permanent inability to drive. The only claim in this case is for Pfizer's failure to accommodate Plaintiff by denying her requested accommodation of either hiring a full-time driver on a permanent basis or creating a position for her that did not exist. Pfizer respectfully submits that summary judgment is appropriate because the claim fails as a matter of law, as well-settled law holds that Pfizer is not required to hire a third person to perform the Plaintiff's job and is not required to create a position for Plaintiff as an accommodation for her medical condition. There are no disputed facts, as Plaintiff and Pfizer agree on every point except the legal questions of whether driving is an essential duty for this position and whether the requested accommodations were reasonable as a matter of law. Any legal ruling to the effect that a company is required to hire drivers for outside sales representatives would significantly impact every company with a field sales force. This type of precedential impact is far beyond what the ADA requires.

I. UNDISPUTED FACTS

Plaintiff was a pharmaceutical sales representative in the Winston-Salem territory for 27 years before she went on disability leave in November 2011 for a vision impairment. (Martin Dep.[1] at 20:4-21; Pl. Dep.[2] at 64:14-20, 79:18-24, 82-83, 171:1-4; Compl. at ¶5.) As a result of her vision impairment, she does not qualify for a NC driver's license. (Martin Dep. at 20:4-21; Pl. Dep. at 79:18-24.) She has no other restrictions. (Martin Dep. at 23:6-11.) Her condition is stable and permanent. (Martin Dep. at 24:22-25:3; Pl. Dep. at 76:8-9, 15-18.)

As a pharmaceutical sales representative, Plaintiff was responsible for meeting with physicians throughout her assigned territory to discuss Pfizer's products, the prescribing information, and the benefits to the physicians' patient base. (Pl. Dep. at 52:3-13.) Plaintiff called on the physicians in person. (Pl. Dep. at 52:14-16.) She testified that she would not have been able to effectively do her job without calling on the physicians in person. (Pl. Dep. at 52:17-20.) She visited on average eight to ten physicians a day. (Pl. Dep. at 52:21-23.) In 2011, she travelled from four to ten locations a day throughout her territory. (Pl. Dep. at 53:5-10.) Her territory was approximately 80 miles in radius. (Pl. Dep. at 44:8-25, 45:3-7.) The Company provided her with a car to perform her job, (Pl. Dep. at 55:2-2), and she spent up to 90% of her work time on travel,

[1] Cited excerpts from Dr. Martin's deposition are attached as Ex. A.
[2] Cited excerpts from Plaintiff's deposition are attached as Ex. B.

(Pl. Dep. at 53-54). She does not have a physical office other than in her home. (Pl. Dep. at 53:18-22.) Plaintiff was "on the road from around 8:30 to 5:30 most days." (Pl. Dep. at 53:14-17.) Plaintiff further testified that she "had to travel to perform the job," and that the way she performed the job for Pfizer was through driving. (Pl. Dep. at 55:17.) Plaintiff agreed that there was no way for her to utilize public transportation to do the job of sales representative for Pfizer in Winston-Salem. (Pl. Dep. at 56-57, 99:4.)

In late October 2011, Plaintiff felt she could not drive due to her vision impairment. (Pl. Dep. at 81-82.) When Plaintiff felt she could not drive herself to a sales meeting at a physician's office, her immediate supervisor, Tom Rulon, came and picked her up and drove her to the customer. (Pl. Dep. at 82:2-11.) The Human Resources representative, John Harp, "told [her] how to apply for an accommodation." (Pl. Dep. at 82:15-18.) Jenny Mark in Pfizer's Occupational Health and Wellness Group provided Plaintiff a form labeled "Reasonable Accommodation Request Form" to complete and return. (Pl. Dep. at 85:7-12; Ex. 10 to Pl's Dep., attached hereto as Ex. C.) On October 27, 2011, Plaintiff returned the Reasonable Accommodation Request Form. (Pl. Dep. at 85:7-12; Ex. C.) Plaintiff requested that Pfizer provide her with a driver, magnifying glasses for reading, and special software for her computer. (Ex. C; Pl. Dep. at 89:3-90:11.) Plaintiff provided medical paperwork from her physician specifically requesting an accommodation for "driving." (*Id.*) Plaintiff also made clear that her request was for a "driver" or "driving service" as an accommodation. (Pl. Dep. at 94:18-25; Ex. 13 to Pl's Dep., attached hereto as Ex. D; Pl. Dep. at 96:2-6.) Plaintiff's request for a driver was on a permanent, full-time basis. (Pl. Dep. at 95:20-96:1.)

A group that consisted of Pfizer's Occupational Health and Safety representative (Jenny Mark), Pfizer's in house employment counsel (Danielle Rosen), Pfizer's Human Resources Manager (John Harp initially), and Pfizer's business team (Thomas Salamone, Regional Manager, and Tom Rulon, District Manager) discussed these proposals and made decisions regarding Plaintiff's requested accommodations. (John Harp Deposition[3] at 73:5-74:16; Thomas Salamone Dep.[4] at 31:6-15, 35:5-36:20, 42:18-43:2; Charisse Smith Deposition[5] at 21:21-23:7, 42:10-16.)

On November 28, Mr. Harp informed Plaintiff that Pfizer would accommodate Plaintiff's request for magnifying glasses and special computer software but explained that Pfizer would not grant her request for a driver because driving is an essential function of the sales representative position and because use of a personal driver would expose Pfizer to significant increased risk and liability related to vehicular accidents, workers compensation, and misappropriation of pharmaceutical samples. (Ex. 15 to Pl's Deposition, attached as Ex. H; Harp Dep. at 77:17-78:22, 93-99; Pl. Dep. at 107:10-109:7, 111:4-10.) Mr. Harp reiterated that Pfizer continued to be willing to explore reasonable accommodations and other positions within the Company that did not require a driver. (Ex. H; Pl. Dep. at 111:11-17.) He offered to further discuss Plaintiff's request and to continue the interactive dialogue. (Pl. Dep. at 111:18-23.)

On December 9, Plaintiff responded to this by reiterating her request for a driver. (Pl. Dep. at 112:25-113:14; Ex. 16 to Pl's Deposition, attached as Ex. I.) She did not propose any other option other than a driving service. (Pl. Dep. at 113:15-114:1; Ex. I.) Plaintiff agreed that "traveling to see customers for face-to-face interaction was a core function," but that she could travel by using an "outside driver." (*Id.*) She also questioned whether Pfizer's liability concerns could be overcome by an appropriate insurance policy on the part of the driving company. (*Id.*) Plaintiff's husband testified that he spoke to several driving services, and none of the services they spoke to provided appropriate assurances that they would be able to offer sufficient insurance or indemnification to Pfizer. (Wesley Stephenson Dep.[6] at 24:4-26:4, 33:1-17, 36:15-25, 40:16-44:17.)

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[3] Cited excerpts from Mr. Harp's deposition transcript are attached as Ex. E.
[4] Cited excerpts from Mr. Salamone's deposition transcript are attached as Ex. F.
[5] Cited excerpts from Ms. Smith's deposition transcript are attached as Ex. G.

On December 19, 2011, Mr. Harp reiterated that Pfizer did not view providing a driver as a reasonable accommodation and set forth Pfizer's position that driving is an essential job function and that the decision to deny a driver was not "based on costs."[7] (Ex. 17 to Pl's Deposition, attached as Ex. K; Pl. Dep. at 116:15-20; Harp Dep. at 122:19-123:7.) Mr. Harp noted that Pfizer was committed to continuing its effort to accommodate Plaintiff's impairment in a position that would not require a driver and set forth several options for Plaintiff to consider, including virtual positions (referred to as teledetailing or web-based detailing,[8] a position on site at Wake Forest, and other such alternatives. (Ex. K; Pl. Dep. at 117:7-120:16; Harp Dep. at 99:10-100:3; Salamone Dep. at 23:22-24:7.) Ms. Stephenson would not relocate for a position. (Pl. Dep. at 137:19-21.)

Mr. Harp left Pfizer at the end of December, and Plaintiff's matter was transferred to Charisse Smith in HR to continue the reasonable accommodation interactive dialogue. (Pl.

[6] Cited excerpts from Mr. Stephenson's deposition transcript are attached as Ex. J.

[7] Plaintiff also acknowledges in her Complaint that the decision was not based on costs. (Compl. at ¶ 29.)

[8] This refers to selling pharmaceutical products remotely, primarily on line, as opposed to through face to face interactions. (Pl. Dep. at 117, 124-125.)

Dep. at 121:4-13; Harp Dep. at 23:8-13; Smith Dep. at 24:19-24.) On January 9, 2012, Charisse Smith and Plaintiff discussed the matter, and Plaintiff repeated her desire for Pfizer to provide her a driver. (Pl. Dep. at 121:20-24, 122:13-22, 122:23-123:3; Smith Dep. at 66:1-68:8.) Ms. Smith again explained that the question of providing a driver had been dealt with and was not an option and that Pfizer wanted to explore other potential accommodations, including a tele-detailing position. (Pl. Dep. at 123:4-9, 123:21-124:17; Smith Dep. at 58:3-60:9, 66:1-68:8.) Plaintiff testified that she did not want to consider the web-based/tele-detailing role because it would "pigeonhole [her] into sitting behind a computer desk all day with – talking to people that [she] didn't know." (Pl. Dep. at 124:19-25.) Plaintiff instead indicated a desire to brainstorm other jobs that did not exist within Pfizer. (Pl. Dep. at 125:10-126:6.)

On February 2, 2012, Plaintiff sent proposals for three job positions to Mr. Salamone, her Regional Manager. (Ex. 20 to Plaintiff's Deposition, attached as Ex. L; Pl. Dep. at 128:18-129:23, 130:4-8; Salamone Dep. at 56:6-57:4.) Plaintiff again stated that her preference was to return to work in her Professional Healthcare Representative position with a driver, as described in the first proposal. (Ex. L; Pl. Dep. at 130:12-13) The other two proposals outlined positions for a trainer and a "key contacts" representative which were not positions that existed at Pfizer. (Pl. Dep. at 130:14-15, 132:18-20; Smith Dep. at 49:2-10; Salamone Dep. at 58:9-60:20.) The Company nonetheless reviewed the proposals but determined that there was not sufficient business to create the positions. (Salamone Dep. at 58:9-60:20; Smith Dep. at 49:2-10.)

On February 8, 2012, Ms. Smith explained that the jobs that Plaintiff proposed did not exist within Pfizer and were not viable and provided Plaintiff a job posting for a tele-detailing position for vaccine sales. (Ex. 21 to Plaintiff's Deposition, attached as Ex. M; Pl. Dep. at 133:3-8, 134:2-22.) Ms. Smith also provided Plaintiff with the job description for the tele-detailing position which would not require driving. (Pl. Dep. at 134:24-135:5.) Ms. Smith specifically told Plaintiff in writing that if she were interested in the role, Pfizer could explore allowing her to work from home. (Ex. M; Smith Dep. at 135:6-12, 13:22-136:5; Salamone Dep. at 24:10-25:9.) Ms. Smith testified that she had already started taking steps to consider arrangements that would allow Plaintiff to perform the work from home. (Smith Dep. at 60:5-19, 61:10-18.) Plaintiff testified that she was not interested in the tele-detailing job and did not apply for the job. (Pl. Dep. at 136:3-137:14.) Ms. Smith also repeatedly directed Plaintiff to open internal job postings and advised her to let her know if there were any she would like to explore. (Ex. M; Pl. Dep. at 127:10-14; Smith Dep. at 79:2-10.) Mr. Salamone testified that "at any given time there are hundreds of positions." (Salamone Dep. at 27:5-9.) Plaintiff testified that she did not apply for or express interest in a single job posting with Pfizer. (Pl. Dep. at 128:4-8.)

On February 22, 2012, Plaintiff sent an e-mail to Ian Read, Pfizer's Chief Executive Officer, in which she reported that the Company would not hire a driver for her. (Ex. 24 to Plaintiff's Deposition, attached as Ex. N; Pl. Dep. at 148:15-149:1, 151:18-21, 157:8-12.) Plaintiff titled her e-mail "OPEN DOOR Policy," but she did not complain that she felt discriminated against on the basis of her disability or any other protected status. (Ex. N.) Instead she simply reiterated her disagreement with the Company's conclusion that hiring a driver was not a reasonable accommodation. (Pl. Dep. at 157:8-12.) Anna DiDio in Employee Relations investigated the Complaint and concluded that it was without merit because driving is an essential job duty of a sales representative position and the Company was not required to create a new position for Plaintiff. (Ex. 25 to Plaintiff's Deposition, attached as Ex. O; Pl. Dep. at 160:6-20; Anna DiDio Dep. at 67:11-21, 93:5-19.)[9] Ms. DiDio reminded Plaintiff to reach out to Ms. Smith if she learned of any positions within Pfizer that she was interested in, and Plaintiff did not do so at any time. (Pl. Dep. at 161:2-7.)

Pfizer provided Plaintiff with Short Term Disability leave beginning in November 2011, Long Term Disability leave beginning in May 2012, and FMLA leave. (Pl. Dep. at 172-175.) She received 100% pay for 13 weeks during her Short Term Disability and FMLA leave and then received 70% pay per her benefits elections until she became eligible for Long Term Disability, through which she receives 60% of her pay per her benefits elections. (Pl. Dep. at 174:1-176:24.) She remains on Long Term Disability leave with 60% pay and has not been terminated. (Pl. Dep. at 175:13-20, 176:9-15, 177:25-178:2.)

The Complaint contains one cause of action for disability discrimination in violation of the Americans with Disability Act, as amended ("ADA"). The Complaint alleges that Defendant failed "to engage in a good-faith, reasonable, interactive process to determine reasonable accommodations to enable plaintiff to return to work" and states that she "is able to perform the essential functions of her job as a sales representative for defendant as long as she is reasonably accommodated with the provision of special magnified equipment and a

[9] Cited excerpts from Ms. DiDio's deposition transcript are attached as Exhibit P.

method of transportation between sales sites." (Compl. at ¶¶ 43-44.) Plaintiff testified that her lawsuit is for Pfizer's failure to provide her a driver:

> Q. In what way do you believe that Pfizer discriminated against you based on your disability?
> A. That they didn't provide me a reasonable accommodation for my disability.
> Q. And by that do you mean their failure to provide a driver?
> A. Yes.
> Q. Is there anything else that you're suing over other than that?
> A. That seems to be the crux of it.
> . . .
> A. [I]t all gets down to the failure to provide a reasonable accommodation.
> Q. In the form of a driver?
> A. Yes.

(Pl. Dep. at 187:17-25, 188:10-25.)

III. STANDARD OF REVIEW

The Supreme Court has held that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (citation omitted). The party moving for summary judgment has the burden of showing the absence of a genuine issue of material fact, and the court must view the evidence before it in the light most favorable to the nonmoving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The nonmoving party must go beyond the pleadings and designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see also Celotex,* 477 U.S. at 323-24. "Genuineness means that the evidence must create fair doubt; wholly speculative assertions will not suffice." *Ross v. Commc'ns Satellite Corp.*, 759 F.2d 355, 364 (4th Cir. 1985). Thus, a party "cannot create a genuine issue of material fact through mere speculation or the building of one inference upon another." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1985). Accordingly, "[m]ere unsupported speculation . . . is not enough to defeat a summary judgment motion." *Ennis v Nat'l Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 62 (4th Cir. 1995). As demonstrated below, there are no genuine issues of material fact with respect to the claims asserted by Plaintiff, and Pfizer is entitled to judgment as a matter of law.

IV. ANALYSIS

A. Plaintiff Cannot Establish A *Prima Facie* Case Of Disability Discrimination.

In a failure to accommodate case under the ADA, a plaintiff establishes a *prima facie* case by showing (1) that she was a qualified individual who had a disability within the meaning of the statute; (2) that the employer had notice of her disability; (3) that with reasonable accommodation she could perform the essential functions of the position; and (4) that the employer refused to make such accommodations. *Crabill v. Charlotte Mecklenburg Bd. of Educ.*, 423 F. App'x 314, 322 (4th Cir. 2011) (citing *Rhoads*, 257 F.3d at 387 n.11); *Haneke v. Mid-Atl. Capital Mgmt.*, 131 F. App'x 399, 400 (4th Cir. 2005). The question of whether a plaintiff is a qualified individual under the ADA is a question of law for the court, not a question of fact for the jury. *Rose v. Home Depot USA, Inc.*, 186 F. Supp. 2d 595, 608 (D. Md. 2002) (quoting *Hooven-Lewis v. Caldera*, 249 F.3d 259, 268 (4th Cir. 2001) (Rehabilitation Act case)).

Plaintiff bears the burden of establishing that she was qualified. *Halpern v. Wake*

Forest Univ. Health Scis., 669 F.3d 454, 462 (4th Cir. 2012); *Harris v. Reston Hosp. Ctr., LLC*, No. 12-1544, 2013 U.S. App. LEXIS 8323, at *23 (4th Cir. Apr. 24, 2013) ("Appellant bears the burden of establishing that she could perform the essential functions of her job."). In determining whether Plaintiff was qualified, the court must decide "(1) whether she could 'perform the essential functions of the job, i.e., functions that bear more than a marginal relationship to the job at issue,' and (2) if not, whether 'any reasonable accommodation by the employer would enable [her] to perform those functions.'" *Tyndall v. Nat'l Educ. Ctrs., Inc.*, 31 F.3d 209, 213 (4th Cir. 1994) (alterations in original) (quoting *Chandler v. City of Dallas*, 2 F.3d 1385, 1393-94 (5th Cir. 1993)). Here, the undisputed evidence demonstrates that Plaintiff cannot make this showing.

1. Driving Is an Essential Function of the Sales Representative Position, and Plaintiff Could Not Perform This Essential Function.

The cases and the regulations make clear that the definition of "essential function" includes all non-marginal functions necessary to perform the job. As noted above in *Tyndall*, the Fourth Circuit has interpreted it to mean "all functions that bear more than a marginal relationship to the job at issue." Essential job function is defined by 29 C.F.R. § 1630.2(n) as follows:

> (n) Essential functions -- (1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position.

Here, the undisputed evidence establishes that driving is an essential job function of the sales representative position that Plaintiff held and that she was unable to perform this essential job function. Thomas Salamone, John Harp, Charisse Smith, and Anna DiDio testified that driving is an essential job function of the sales representative position and that the position could not be done without driving. (Salamone Dep. at 49:3-4, 53:3-15, 53:16-54:2; Smith Dep. at 38:3-16; Harp Dep. at 79:11-21, 80:3-4, 80:9-81:2, 82:14-83:11; DiDio Dep. at 70:7-10, 72:3-16.) All of the testimony is clear that if a sales representative is unable to drive, she is unable to do the job. (Pl. Dep. at 54; Dep. Charisse Smith at 38:3-16 Dep. John Harp at 79:11-21, 80:3-4, 80:9-81:2, 82:14-83:11; Dep. Thomas Salamone at 49:3-4; DiDio Dep. at 68:18-24, 70:7-10, 72:3-16, 75:7-16, 76:4-7, 76:18-22.) Plaintiff testified that she could not perform her job duties as a sales representative for Pfizer unless a driver or other transportation was arranged for her. (Pl. Dep. at 92:10-13.) She concedes that the only "transportation" she could be provided would be "a driver." (Pl. Dep. at 99:8-12.) She further acknowledges that the "only options" to be "physically in the field" were for Pfizer to hire a driver or a driving service for her.[10] (Pl. Dep. at 97:15-22.) The sales representatives in her territory did not call on physicians as a team, and Plaintiff agreed that having multiple representatives ride together to call on physicians would not make "business sense" and would be a "waste of time." (Pl. Dep. at 51:18-52:1.) Plaintiff acknowledged that the Company provided her with a Company car to perform her job, that she drove around 1600 miles in 2011 (through October 27), that the "majority"/"bulk" of her job was on the road traveling to meet with physicians, that she was "on the road from around 8:30 to 5:30 most days," that she traveled anywhere from "four to ten locations on average" a day throughout the

[10] Plaintiff never proposed to pay for a driver or driving service herself. (Pl. Dep. at 97:20-25.)

Winston-Salem territory to meet with different physicians' offices, and that this was how she spent at least 90% of her time other than a couple of hours doing "paperwork and studying." (Pl. Dep. at 53-54.) Plaintiff's Complaint admits that her "position as a pharmaceutical sales representative required her to travel to doctor's offices and medical facilities within the territory of Winston-Salem, to meet with doctors, and educate them concerning defendant's products." (Compl. at ¶ 6; Pl. Dep. at 55.) She testified that the way "[she] always performed the job for Pfizer was through driving." (Pl. Dep. at 55.) There are no sales representatives for Pfizer who do not drive. (Pl. Dep. at 55; Salamone Dep. at 23:16-21, 47:15-17, 54:16-55:1, 55:7-14.)

There are a number of Company records that reflect that driving is an essential function, including the new hire documents which specify that the Company is providing a car to sales representatives and requires a clean driving record. (DiDio Dep. at 72:3-16; Dep. John Harp at 65:13-22, 66:5-21, 67:2-15; Salamone Dep. at 49:3-9, 54:4-8.) There are annual checks of the sales representatives driving records, and representatives are disciplined and terminated for poor driving records and rewarded for positive driving records. (DiDio Dep. at 72:3-16; Dep. John Harp at 65:13-22, 66:5-21, 67:2-15.) There is list of the essential functions for the sales representative position, and driving is listed on it. (DEF 004828, attached as Exhibit Q.)[11]

In evaluating sales jobs similar to the sales representative job held by Plaintiff, federal courts across the country have held that driving is an essential function of such a job. *See, e.g., Mathews v. Trilogy Comm., Inc.*, 143 F.3d 1160, 1164 (8th Cir. 1998)

[11] Unpublished Opinions attached as Exhibit R.

("[Plaintiff] was not qualified to perform one of the essential functions of a traveling salesperson—driving to the locations of clients."); *Walsh v. AT&T Corp.*, No. 1:05 CV 00769, 2007 U.S. Dist. LEXIS 50051, at *18 (N.D. Ohio July 11, 2007) (holding that driving to Columbus was an essential function of the plaintiff's job as sales representative); *Dicino v. Aetna U.S. Healthcare*, No. 01-3206, 2003 U.S. Dist. LEXIS 26487, at *54 (D.N.J. June 23, 2003) (holding that plaintiff could not perform the essential functions of the sales account manager position because she could not drive to customer locations throughout South New Jersey); *Oliva v. Pride Container Corp.*, 81 F. Supp. 2d 907, 911 (N.D. Ill. 2000) (noting that driving was an essential function of plaintiff's job as sales representative); *Durning v. Duffens Optical, Inc.*, No. 95-1093, 1996 U.S. Dist. LEXIS 1685, at *19 (E.D. La. Feb. 15, 1996) (finding that sales representative's "inability to drive long distances and, as a consequence, to make in-person sales calls to remote customers is uncontroverted. Accordingly, the Court finds that he could not perform the essential function of his position."). Thus, based on this well-reasoned and established case law and regulations, this Court should conclude as a matter of law that driving is an essential function of the sales representative position at issue, and there is no dispute that Plaintiff could not perform this essential function.

2. As a Matter of Well-Settled Law, Pfizer Is Not Required to Hire an Additional Person to Perform an Essential Function or Eliminate an Essential Function.

The ADA regulations specifically state that it is not a reasonable accommodation to require the employer to eliminate essential job functions, modify essential job duties, or hire new employees. *See* 29 C.F.R. § 1630.2(o) (where the job is checking identification cards, "[a]n employer would not have to provide an individual who is legally blind with an assistant to look at . . . identification cards for the legally blind employee"). Courts have repeatedly held as a matter of law that an employer does not have to hire an additional person to perform an essential job function; nor is an employer obligated to eliminate an essential job function. For example, in *Martinson*, the Fourth Circuit made clear that the employer was not required to hire someone to perform this function:

> To accommodate Martinson adequately, Kinney would need to hire an additional person to perform the essential security function of Martinson's job. The ADA simply does not require an employer to hire an additional person to perform an essential function of a disabled employee's position.

Martinson v. Kinney Shoe Corp., 104 F.3d 683, 687 (4th Cir. 1997). Likewise, in *Lusby v. Metro. Washington Airports Auth.*, No. 98-2162, 1999 U.S. App. LEXIS 18428, at *16 (4th Cir. 1999), the Fourth Circuit explained that the plaintiff's former employer was not required to hire someone else to perform the essential functions of the plaintiff's job. *Id.* at *15.

Similarly, in *Hill v. Southeastern Freight Lines, Inc*., 877 F. Supp. 2d 375, 392 (M.D.N.C. 2012), *affm'd by* 2013 U.S. App. Lexis 7471 (4th Cir. 2013), this Court held that the defendant was not required to accommodate the plaintiff by allowing him to perform the linehaul position during the daytime because nighttime driving is an essential function of the position, and defendant was not required to exempt Plaintiff from an essential function of the position in order to accommodate him. Also, in *Clement v. Bojangles' Rest. Inc., No*. 1:99CV1010, 2001 WL 66317, at *4 (M.D.N.C. Jan. 4, 2001), this Court found that exempting the plaintiff from performing many of his essential functions was not reasonable as a matter of law, and thus was not required by the ADA.

There are numerous other cases that hold as a matter of law that an employer is not required to eliminate an essential job function or to assign an essential job function to another employee. *See, e.g., Brickers v. Cleveland Bd. of Educ*., 145 F.3d 846, 850 (6th Cir. 1998) (finding that "[t]he ADA does not demand that an employer exempt a disabled employee from an essential function of the job as an accommodation"); *Walsh*, 2007 U.S. Dist. LEXIS 50051, at *18 ("The ADA does not require AT&T to re-structure the essential duties attendant with Mr. Walsh's position. Nor does the ADA require AT&T to assign Mr. Walsh's duties to his colleagues . . . ."); *Durning*, 1996 U.S. Dist. LEXIS 1685, at *19 (holding that employer was not required to eliminate the requirement that plaintiff drive to customer locations to make in-person sales calls because it was an essential function of the job); *Ricks v. Xerox Corp*., 877 F. Supp. 1468, 1477 (D. Kan. 1995) (holding that the ADA does not require an employer to hire a full-time helper to assist a disabled employee as a reasonable accommodation); *cf. School Bd. of Nassau County v. Arline*, 480 U.S. 273, 289 n.19 (1987).

B. It is Not A Reasonable Accommodation to Require the Company to Hire a Driver or Allow Plaintiff to Hire a Driver to Do Her Job.

Even assuming driving is not an essential job duty, which Pfizer disputes, hiring another employee as a full-time driver on an indefinite basis in this circumstance is not a reasonable accommodation as a matter of law for Plaintiff's visual impairment. *See, e.g., Hendrix v. AT&T*, 24 Am. Disabilities Cases (BNA) 1356 (D.S.C. 2011) (granting summary judgment to employer and holding that employee with sudden onset of permanent blindness failed to present a compelling argument to refute employer's position that permitting employee's wife, "who is not an AT&T employee- to drive him on AT&T business, thus potentially exposing AT&T to liability for her actions" would subject AT&T to undue hardship and is not feasible); *Gilman v. Schwan's Home Serv., Inc.*, 565 F.Supp.2d 1050 (D. Minn. 2008) ("For approximately two weeks, the Plaintiff was provided someone to drive the truck for him[, but] providing Plaintiff a driver was not a reasonable accommodation, so efforts were made to find other positions for the Plaintiff within the company.").

Pfizer specifically noted that in addition to the essential job duty issue, the requested accommodation was inherently not feasible because of increased liability risks associated with having a third party, non-Pfizer colleague, drive Plaintiff on a permanent basis. (Exhibits 15 & 17 to Pl's Deposition.) Those risks include increased exposure and liability from workers' compensation claims, vehicular accidents, stolen or lost pharmaceutical samples, and legal risks attendant to co-employment from having an individual not employed by Pfizer driving a sales representative on a permanent, full-time basis every day for most of the day. (John Harp Dep. at 65:13-22, 69:1-69:17, 83:22-84:6, 90:5-14, 101:3-102:4, 110:15-111:8, 111:17-112:9, 113:2-13, 113:15-114:5, 122:1-9, 134:4-135:3, 135:13-136:1, 137:19-138:2, 150:8-14, 151:8-16; Charisse Smith Dep. at 29:1-16.) John Harp and Charisse Smith explained these liability concerns in detail. (*Id.*) Plaintiff has never responded to Pfizer's liability concerns in connection with having a full-time, permanent third party driving Plaintiff daily. (Wesley Stephenson Dep. at 24:4-26:4, 33:1-17, 36:15-25, 40:16-44:17.

C. The Company Was Not Required to Create a New Position for Plaintiff as an Accommodation as a Matter of Law.

Next, Plaintiff asserts that Pfizer failed to reasonably accommodate her because they did not accept one of the three job proposals that she proposed. (Pl. Dep. at 201:23-202:2.) Her three job proposals were: (1) return to her position with a driver; (2) create a Regional Trainer position; or (3) create a "Key Customer Interface Specialist" position. (Exhibit 20 to Plaintiff's Deposition; Pl. Dep. at 128:18-129:23, 130:4-8; Salamone Dep. at 56:6-57:4.)

The first proposal is addressed above. With respect to the remaining two proposals, it is undisputed that these positions did not exist. (Pl. Dep. at 130:14-15, 132:18-20; Smith Dep. at 49:2-10; Salamone Dep. at 58:9-60:20.) The law is clear that the Company was not required to create a new position for Plaintiff. *See Ammons v. Aramark Uniform Servs., Inc*., 368 F.3d 809, 819 (7th Cir. 2004) (disabled employee's proposal that entailed altering essential functions of his job was request for new position, not reasonable accommodation); *Wellington v. Lyon Cnty. Sch. Dist*., 187 F.3d 1150, 1155 (9th Cir. 1999) (an employer does not have a duty to create a new position to accommodate a disabled employee); *Norville v. Staten Island Univ. Hosp*., 196 F.3d 89, 99 (2d Cir. 1999); *accord Hedrick v. W. Reserve Care Sys*., 355 F.3d 444, 457 (6th Cir. 2004); *Smith v. Midland Brake, Inc*., 180 F.3d 1154, 1174-75 (10th Cir. 1999) (en banc); *Still v. Freeport-McMoran, Inc*., 120 F.3d 50, 53 (5th Cir. 1997); *Benson v. Nw. Airlines,* *Inc.*, 62 F.3d 1108, 1114 (8th Cir. 1995). Accordingly, this aspect of Plaintiff's ADA claim fails as a matter of law because there is no requirement to create a new position for Plaintiff as a reasonable accommodation.

D. Plaintiff's Failure to Participate in the Reasonable Accommodation Process.

Finally, a disability claim is barred when an employee rejects an employer's reasonable accommodations and refuses to engage in the interactive process. Here, Plaintiff refused to consider available job postings and instead continuously insisted on a driver or creation of a new job. As the Fourth Circuit Court of Appeals has emphasized with respect to the ADA interactive process:

> neither party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. . . . In essence, courts should attempt to isolate the cause of the breakdown and assign responsibility.

Crabill, 423 F. App'x at 323 (emphasis added) (citation omitted). "[A]n employer cannot be found to have violated the ADA when responsibility for the breakdown of the 'informal interactive process' is traceable to the employee and not the employer." *Id.*

Pfizer's accommodation processes and efforts are well-documented. *Supra* at 5-8. Plaintiff's testimony was that she refused to consider the tele-detailing opportunity, refused to relocate, and did not express any interest in any other available position with Pfizer, despite the fact that 100s of positions are available with Pfizer at any time. (Salamone Dep. at 27:5-9; Pl. Dep. at 128:4-8.) Plaintiff's only proposed accommodations were to either provide a driver or create a position for her. *Supra* at 5-8.

The law is clear that Pfizer was only required to offer a reasonable accommodation, not Plaintiff's preferred accommodation. *O'Grady v. Zurich Holding Co. of Am.*, 12 Fed. Appx. 96 (4th Cir. 2001); *EEOC v. Firestone Fibers & Textiles Co.*, 515 F.3d 307, 312 (4th Cir. 2008). Plaintiff's steadfast refusal to consider any of the accommodations explored by Pfizer other than her preferred accommodations of hiring a driver or creating a new position obstructed the process and bars Plaintiff's instant claim. *Crabill*, 423 F. App'x at 323.

IV. CONCLUSION

For the reasons stated herein, Pfizer respectfully requests that its Motion for Summary Judgment be granted.

Respectfully submitted this the 6th day of March, 2013.

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IN THE UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

WHITNEY C. STEPHENSON, Plaintiff, vs. PFIZER INC., Defendant.	))))))))))	**CERTIFICATE OF SERVICE** CIVIL ACTION NO. 1:13-cv-147

The undersigned hereby certify that on March 6, 2014, the foregoing *Defendant's Memorandum in Support of Motion for Summary Judgment* was electronically filed with the Court, using the Court's CM/ECF system, which will send notification of such filing as follows:

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